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In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 262.

THE GOODYEAR TIRE & RUBBER COMPANY, INC.
and
GENERAL DRY BATTERIES, INC.,
Petitioners,

vs.

RAY-O-VAC COMPANY,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS.

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In view of the fact that Respondent in its Brief has seen fit to go outside of the Record and to make statements which are misleading and not supported by the Record, a short Reply Brief is deemed necessary.

On page 2 of Respondent's Brief it is stated that the Government may use any invention without license from the owner and can order the patented dry cells from Petitioners without fear of any injunction or contempt proceedings. In support of this statement, Respondent cites 35 U. S. C. A. Section 68. This statement is only partly true and is quite misleading. As is pointed out at page 6 of Petitioners' Main Brief, the Government in most cases requires the supplier or contractor to guarantee to save it harmless in case of suit for patent infringement, and the guarantee quoted at page 6 of Petitioners' Brief is a typical provision which makes the manufacturer liable for costs and expenses on account of patent infringement. Moreover, Genegal Dry Batteries, Inc. is now enjoined from manufacturing, using or selling any cell which will

infringe upon the Anthony patent in suit. The injunction appears at page 142 of the Record and has not been modified or lifted. Petitioners were only given the right to dispose of a limited number of dry cells which they had on hand after filing a supersedeas bond which was approved by the District Judge.

On page 3 of Respondent's Brief the following statement is made:

> "The patent in suit was the first to teach the sealing up and confining of the pressure in a cell."

This statement is untrue for the patent states at page 1, line 44, *et seq.*:

> "A perforation 21 in the end cap permits venting of gas through the carbon terminal."

How can the pressure be confined within the cell if means are provided for relieving the pressure by venting the gas through the carbon terminal? Respondent here speaks of its commercial cell which is **not** the cell of the patent disclosure. Anthony was not the first to teach the sealing up of a cell to prevent leakage—see Millar patent No. 1,654,823, Rec. pp. 214 *et seq.*, and Olaneta patent No. 1,623,719, Rec. pp. 206, *et seq.*

Respondent states on page 4 of its Brief that so far as they know, no other **leak-proof** construction has been approved (leak-proof by what standard?). The Record is silent as to this; but obviously if National Carbon Co. and Bright Star Battery Co. are furnishing the Government cells which meet the specifications, they must have met the test prescribed and must have been approved.

Another amazing statement appears in Respondent's Brief at page 2 and also at page 5, to the effect that General Dry Batteries, Inc. was given a royalty-free license to furnish an infringing cell for the Government known as BA-37. It is stated that

> "The license was given immediately when requested and no royalty was charged."

This statement is indeed surprising as General Dry Batteries, Inc. never asked for nor received a license to make the alleged infringing cell and is enjoined from making such a cell by Court order. Petitioners were given a limited right to dispose of the alleged infringing dry cells they had on hand and that is all. That privilege was given only after posting a bond.

Respondent's Brief points out at page 4 that there are a number of other competitors in this field, enumerating some by name, and argues that there should be ample opportunity to test the patent in other Circuits and that another infringer might bring a Declaratory Judgment suit in another Circuit. Respondent speculates on the possibility of the patent in suit being challenged through Declaratory Judgment proceedings by some other competitor in some other Circuit at some future time, whereby an appealable conflict of opinion may arise. However, Respondent states (Brief, p. 1) that there are no other infringers. Therefore Respondent rests supremely endowed in the Seventh Circuit with a Judicial grant far beyond the patent claims and the patent disclosure. Practically all battery manufacturers have national distribution and the cells here in question are sold in thousands of retail outlets all over the country. Should any other manufacturer make a metal encased dry cell, Respondent could merely wait until such a cell appeared in the Seventh Circuit in the usual course of distribution and then sue a distributor, jobber or retailer, as it did in the instant case. Respondent could thus avoid an adverse decision in another Circuit or any diversity of opinion in different Circuits.

At page 2 of Respondent's Brief the following statement is made:

"Respondent's, Ray-O-Vac, leak-proof cell is recognized by the United States Army Signal Corps as being without a peer."

We submit that the Record does not bear out this statement.*

At page 5 of Respondent's Brief a quotation is made from Appellants' (Petitioners) Brief before the Court of Appeals. The quotation is as follows:

> "We are not seeking to have the three claims in suit declared invalid."

This quotation is only a part of a sentence and is calculated to deceive the Court and to destroy the meaning of the entire sentence which is as follows:

> "We are not seeking to have the three claims in suit declared invalid **but merely a decision holding that the claims in suit when interpreted in view of the prior art and file history, are not entitled to an interpretation sufficiently broad to cover the accused cell.**"

We are indeed surprised that Respondent would take such liberty. There can be no doubt that Petitioners are seeking to have the claims in suit declared invalid **if broadened to cover the alleged infringing cell.** In support of this we quote the following paragraph from Appellants' (Petitioners) Brief before the Court of Appeals:

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* We are reliably informed by Cyril P. Deibel, President of General Dry Batteries, Inc., that the Army alone uses more than 65 million flashlight cells per year of various constructions, with National Carbon Co., Bright Star Co. and Ray-O-Vac all sharing in the production of such cells, which meet the Army specifications with respect to leakage. The Army test for these cells is contained in specification No. 70-130A, which is as follows:

> "F-3A *Leakage Test.* Two batteries BA-30 connected in series shall be discharged through 10 Ohms for 24 hours and then stored for 15 days, during which time they shall not leak or show any evidence of cell perforations."

Any manufacturer's dry cell which meets this specification and passes this test is acceptable to the Army, and the manufacturer merely has to guarantee that his cell meets this test regardless of construction. In support of this statement we print as an Appendix to this Brief a letter recently received from Cyril P. Deibel, President of General Dry Batteries, Inc.—

"The Court below also erred in failing to hold that if claims 1, 2 and 3 are given a sufficiently broad interpretation to cover the accused cell, then such claims are invalid in view of the prior art and prior practice relied upon."

Respondent's Brief is indeed a fine example of sheer flag-waving. However, we do not believe that this Court will be influenced by flag waving or be at all concerned with whether the Ray-O-Vac Company was awarded the Army and Navy "E." Cases are of record where recipients of the Army and Navy "E" have been indicted for defrauding the Government shortly after the award. The only issue here presented is whether this Court should take this case for review irrespective of Respondent's contribution to the War effort.

We are printing as an Appendix to this Brief United States Letters Patent to C. P. Deibel No. 2,289,249, issued July 7, 1942. This patent discloses and claims Defendants' (Petitioners) accused cell. It is believed that this Court may properly take judicial notice of this patent. This patent is reproduced in this Brief for the purpose of showing that the accused cell is distinctly different from the cell of the patent in suit both in construction and in theory of operation; and for the further purpose of showing that the Patent Office considered the cell of the Deibel patent to be sufficiently novel and different and a sufficient improvement over the cell of the Anthony patent in suit to warrant the granting of an improvement patent.

The Deibel patent distinctly points out that the upper edge of the cup is embedded in a rubber gasket to **provide valve means for permitting excessive pressure to be relieved**, whereas Respondent argues (Brief p. 3) that Anthony was the first to **teach the sealing up and confining of the pressure in a cell.** It therefore appears that in the accused cell the pressure is relieved while in the Anthony commercial cell the pressure is confined within the cell.

We will not lengthen this Brief further but refer the Court to Petitioners' Brief in support of the Petition wherein it is believed the issues have been clearly and accurately presented.

Wherefore, your Petitioners earnestly pray that the Petition be granted and this case reviewed and the Decree of the Court of Appeals for the Seventh Circuit reversed.

Respectfully submitted,

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Of Counsel.

General DRY BATTERIES, INC.

MAIN OFFICES • 13000 ATHENS AVENUE • CLEVELAND, OHIO • CABLE ADDRESS GENDRYBAT

C P DEIBEL
PRESIDENT

September 28, 1943

(Received Sep 29 1943
Fay Golrick Chilton & Isler)

Mr. W. E. Chilton,
1022 Leader Building,
Cleveland 14, Ohio

Dear Mr. Chilton:

I have read Ray-O-Vac's Brief in Opposition to our Petition for Writ of Certiorari and am quite amazed at some of the statements contained therein. This Company made and sold many dry cells which met the Government specifications as to leakage. Such a cell is disclosed in my patent No. 2,289,249 of July 7, 1942, and is not involved in this suit.

I would like to categorically deny the statement contained in their brief to the effect that General Dry Batteries, Inc. either asked for or received a royalty-free license or any license to manufacture cells known as BA-37. As a matter of fact, the Company is enjoined by order of the Federal Court from making any cell which would infringe the Anthony patent upon which we were sued. We never asked for or received any royalty-free license to make cells for anybody under Ray-O-Vac's patents.

The Army alone uses more than 65 million flashlight cells per year, with National Carbon, Bright Star and Ray-O-Vac all sharing in the production of such cells which meet the Government specifications with respect to leakage. The Army test for these cells is contained in Specification No. 70-130 which reads as follows: "F-3A *Leakage Test*. Two batteries BA-30, connected in series, shall be discharged through 10 Ohms for 24 hours and then stored for 15 days, during which time they shall not leak or show any evidence of cell perforations."

Any manufacturer's dry cell which passes this test is acceptable to the Army and the manufacturer merely has to guarantee that his cell meets this test. Our cells have passed this test and I presume other manufacturers' cells do also or they would not be making them for the Army.

As far as I am aware, there is no proof whatever that the Ray-O-Vac cell is "recognized by the United States Army Signal Corps as being without a peer," as stated in the Ray-O-Vac Brief, on Page 2.

Their Brief states on Page 5 that only 2 million cells were ordered for the Armed Forces from Ray-O-Vac during the month of August, 1943. This might be due to the fact that the Armed Forces were purchasing other dry cells.

In conclusion I might state that their Brief constitutes the most glaring instance of sheer flag waving I have ever seen.

Yours very truly,

C. P. Deibel

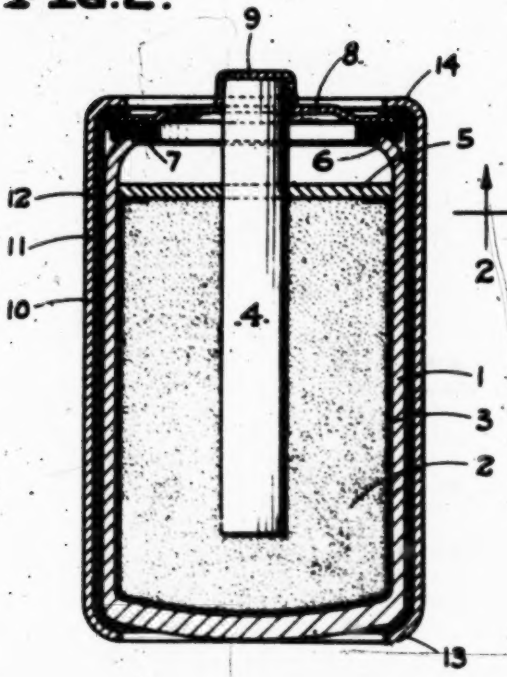
CPD:M

July 7, 1942. C. P. DEIBEL 2,289,249

DRY CELL BATTERY

Filed July 2, 1941

Fig. 2.



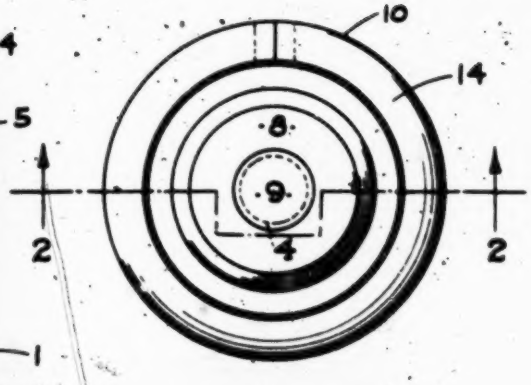


Fig. 1.

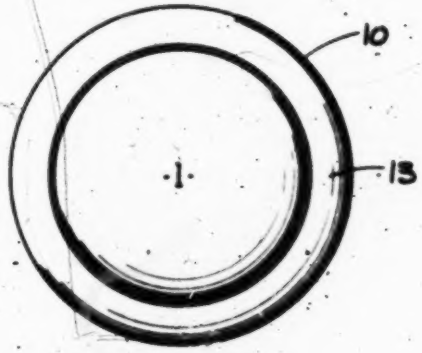


Fig. 3.

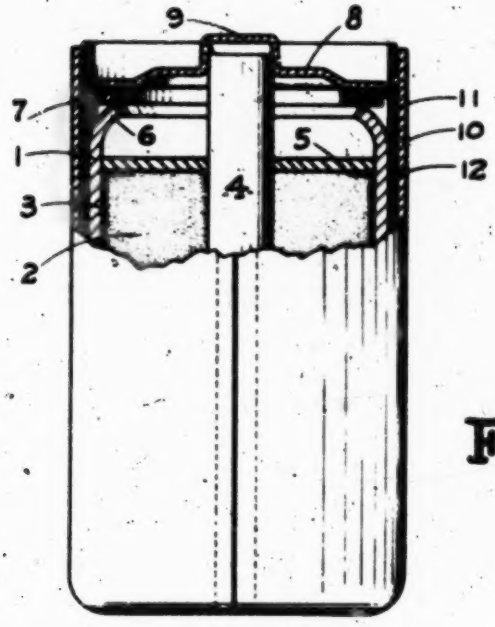


Fig. 4.

INVENTOR.
CYRIL P. DEIBEL
BY William E. Chilton
ATTORNEY.

UNITED STATES PATENT OFFICE

2,289,249

DRY CELL BATTERY

Cyril P. Deibel, Lakewood, Ohio

Application July 2, 1941, Serial No. 400,773

2 Claims. (Cl. 136—133)

This invention relates generally to a dry cell battery which is particularly adapted for use with flashlights and which is also suitable for any use where leak-proof or substantially leak-proof dry cells are required.

One of the objects of the invention is to provide a battery which contains one or more dry cells which are enclosed within a suitable casing or sheath in such a manner as to permit excessive pressure within the battery to be relieved while preventing or reducing to a minimum the leakage of the liquid contents of the cell and at the same time preventing ingress of outside air into the cell or cells.

A further object of the invention is to provide a dry cell battery which preferably comprises a zinc cup containing suitable depolarizing mix, an electrolyte and a carbon electrode and which is closed by an imperforate metal closure, which is held in liquid-tight sealing relation with the cup, and which has electrical contact with the carbon electrode and is electrically insulated from the cup; together with a metal sheath which surrounds the cup and is insulated from both the cup and the metal closure and which holds the metal closure in place in such a manner that excessive pressure within the cell may be relieved without leakage of the liquid contents of the cell.

A still further object of the invention is to provide a dry cell which comprises an outer electrode preferably in the form of a zinc cup the upper edge of which is deflected inwardly and which receives thereover a sealing member or gasket which is formed of rubber or other suitable material together with an imperforate metal cap or closure resting on said gasket and held in somewhat resilient contact therewith by a metal sheath, the metal cap serving to close both the zinc cup and the metal sheath and cooperating therewith so as to provide means for venting the excessive pressure within the cell without permitting any substantial leakage of the liquid contents of the cell, the metal cap being insulated from both the metal sheath and the cup but having electrical contact with the carbon electrode.

A further object of the invention is to provide a dry cell having the above described distinguishing features and characteristics and which is well adapted for quantity production at comparatively low cost.

Further and more limited objects of the invention will appear as the description proceeds and by reference to the accompanying drawing in which Fig. 1 is a top plan view of a dry cell embodying the features of my invention; Fig. 2 is a vertical sectional view on the line 2—2 of Fig. 1; Fig. 3 is a bottom plan view of the cell; and Fig. 4 is a view partly in section and partly in elevation before the metal closing member is permanently secured in place.

Referring now to the drawing, the reference character 1 designates an extruded zinc cup the bottom wall of which is of substantially greater thickness than the side wall thereof. The zinc cup contains a mass of depolarizing mix 2 which is enclosed by a paper liner 3 and receives therein a carbon electrode 4. Disposed over the top of the mix and surrounding the carbon electrode is a washer 5 formed of paper or the like. The upper end of the cup is deflected inwardly as shown at 6 so as to provide a sharp peripheral edge.

Resting on the peripheral edge of the cup is a relatively thick washer 7 which is preferably formed of rubber or some other suitable electrical insulating material. Fitting over the washer 7 is an imperforate metal cap or closure 8 having a peripheral flange thereon which serves to receive and position the washer 7. The metal cap 8 has a recess or shouldered portion 9 which receives the upper end of the carbon electrode therein. Surrounding the cell is a tubular metal sheath 10 which is preferably coated on the interior thereof with a thin layer 11 of lacquer or the like. Fitting within the tubular metal sheath is a liner 12 which is preferably formed of "Pliofilm" or other suitable electrical insulating material. Pliofilm is hydrochlorinated rubber, that is, rubber to which hydrogen chloride has been added. It is a good insulator, strong and somewhat stretchable, tear resistant and impervious to gas and liquids and is not affected by hydrocarbons and is capable of being fused by the application of heat. The liner 12 is slightly longer than the tubular member and extends beyond the ends thereof.

In assembling the cell, the mix and carbon electrode are first inserted into the zinc cup and the upper peripheral edge of the cup is then deflected inwardly. The rubber washer or gasket 7 is then placed over the end of the cup in engagement with the rather sharp peripheral edge thereof. The imperforate metal cap is then placed over the carbon electrode in the position shown in Fig. 4. The cell is then inserted within the outer metal sheath or casing 10, the lower end of the sheath having first been deflected over inwardly as indicated at 13. The cell is then

placed within a suitable fixture and pressure is applied to the metal closure 8 to move it to the position shown in Fig. 1. The upper end of the tubular metal sheath 10 is then spun over inwardly, as indicated at 14 in Fig. 1.

It will be noted that the washer 6 is disposed a short distance below the top of the cell and serves to provide a gas chamber. It will also be noted that the liner 12 is folded over the top of the metal closure and also over the bottom of the zinc cup and serves to insulate the zinc cup from the metal sheath. The coating of lacquer serves as a further electrical insulating medium to prevent electrical contact between the zinc cup and the metal sheath. It will be noted also that the upper sharp peripheral edge of the zinc cup bites into the rubber gasket as will appear most clearly from Fig. 1, so as to provide an effective seal for preventing ingress of air into the cell and also to substantially prevent the escape of any of the liquid contents of the cell. The rubber gasket 7 cooperates with the upper peripheral edge of the cup and the imperforate metal closure 8 to provide a somewhat resilient sealing means which permits excessive pressure within the cell to be relieved. The rubber washer is sufficiently porous to permit gas pressure to escape therethrough while preventing the liquid contents of the cell from escaping to any substantial degree. It will be seen that the zinc cup is thoroughly and completely insulated from the outer metal shell as well as from the imperforate metal cap and that a liquid-tight joint is provided at the opposite ends of the metal sheath.

It will now be clear that I have provided a dry cell which will accomplish the objects of the invention as hereinbefore stated. It will of course be understood that various changes may be made in the details of construction as well as in the specific materials used without departing from the spirit of the invention, and that the embodiment of the invention herein disclosed is to be considered merely as illustrative and not in a limiting sense, as the invention is limited only in accordance with the scope of the appended claims. It is contemplated that two or more cells may be used within a single metal sheath, if necessary or desirable.

Having thus described my invention, what I claim is:

1. A dry cell comprising a zinc cup containing a mass of mix, an electrolyte and a carbon electrode, the upper end of said cup being deflected inwardly so as to provide a sharp upstanding peripheral edge formed by the corner between the side and end of said cup, a rubber gasket of substantial thickness and some porosity engaging said peripheral edge, an imperforate metal cap disposed over said gasket and having good electrical contact with said carbon electrode but insulated from said cup, said cup having an annular flat portion adjacent the outer edge thereof terminating in a downturned flange engaging the peripheral edge of said gasket and serving to position the same, a tubular metal sheath surrounding said cup and having one end deflected inwardly over said cap substantially horizontally and its opposite end deflected inwardly over the bottom edge of said cup, a thin lining of insulating material insulating said tubular sheath from both said cap and said cup, the upper sharp peripheral edge of said cup being embedded in said rubber gasket and providing valve means permitting excessive pressure to be relieved but preventing ingress of outside air, the inwardly deflected upper edge of said sheath being folded over the downturned flange on said metal cap and serving to compress said gasket against the sharp peripheral edge of said cup.

2. A dry cell comprising a zinc cup containing a mass of mix, an electrolyte and a carbon electrode, the upper end of said cup being deflected inwardly so as to provide a sharp upstanding peripheral edge, a rubber gasket of substantial thickness engaging said peripheral edge, an imperforate metal cap disposed over said gasket and having good electrical contact with said carbon electrode but insulated from said cup, said cap having a downturned flange engaging the peripheral edge of said gasket and serving to position the same, a tubular metal sheath surrounding said cup and having one end deflected inwardly over said cap substantially horizontally and its opposite end deflected inwardly over the bottom of said cup, a thin insulating cover formed of a distensible material which is impervious to gas and liquids, and which is not materially affected by hydrocarbons insulating said tubular sheath from both said cap and said cup, the upper sharp peripheral edge of said cup being embedded in said rubber gasket and providing valve means permitting excessive pressure to be relieved but preventing ingress of outside air, said gasket being compressed between the sharp peripheral edge of said cup and the substantially flat inwardly deflected portion of the adjacent end of said sheath.

CYRIL P. DEIBEL.